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No. 06-694

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

MICHAEL WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. ("MIM") as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

MIM is a New York, non-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

MIM has an interest in this case because it is frequently asked by federal and state law enforcement agencies, legislators, and private citizens for advice and guidance on methods to enforce and improve existing laws concerning the regulation and distribution of obscenity, child

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Robin S. Whitehead and Co-Counsel Robert W. Peters of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

pornography and exploitation, and child sexual abuse. MIM recognizes this case to be a major precedent in regulating the pandering, production, distribution and possession of actual or virtual child pornography.

MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) and 542 U.S. 656 (2004).

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

CONSENT TO FILE BRIEF

The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

SUMMARY OF ARGUMENT

The pandering doctrine speaks to the merchandising of sexually explicit material in such a way as to purposely emphasize its prurient appeal. This doctrine emerged in Judge Learned Hand's opinion in *United States v. Rebhuhn* in 1940 and was later upheld in 1966 in *United States v. Ginzburg*. Despite language by the Eleventh Circuit in the instant case that *Ginzburg's* "precedential value is questionable" due to the Court's affordance of more protection to commercial speech, *amicus* argues that the pandering doctrine is still good law and can properly be used to determine whether the underlying material at issue in a particular case has violated either obscenity or child pornography laws.

ARGUMENT

I. *UNITED STATES V. GINZBURG* IS STILL GOOD LAW

In *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), the Court of Appeals opined that notwithstanding the "brief mention" of *United States v. Ginzburg*, 383 U.S. 463 (1966) by this Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002),[2] "there is some question as to the continued vitality of the *Ginzburg* pandering rationale."[3] The 11th Circuit went on to say:

> Shortly after *Ginzburg* was decided, the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*...that truthful, non-misleading commercial speech is protected by the First Amendment...The sort of pandering that caused the publications in *Ginzburg* to be found obscene, in other words, has since gained some First Amendment protection. In one of two post-*Ginzburg* cases in the 1970s, a dissent joined by four justices states that '*Ginzburg* cannot survive *Virginia Pharmacy*'...While the Supreme Court has not substantially addressed the *Ginzburg* pandering rationale since the 1970s, Justice Stevens more recently reiterated that, since *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, a proposal that otherwise legal material be deemed obscene on the basis of its titillating marketing, is 'anachronistic'...

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[2] 535 U.S. at 258 ("in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test").

[3] 444 F.3d at 1301.

> Consequently, although *Ginzburg* has not been overturned, its precedential value is questionable.[4]

Justice Stevens "reiterated" his disapproval of *Ginzburg* in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, at 828-829 (2000).

In *United States v. Ginzburg*, 383 U.S. 463 (1966), this Court upheld convictions for mailing matter that was obscene and for using the mails to advertise matter that was obscene, in violation of 18 U.S.C. 1461. Since the Government stipulated at trial that the circulars advertising the publications were not themselves obscene, the convictions on the counts for using the mails to advertise obscenity stood only because the mailing of the publications offended the statute.[5]

In *Ginzburg*, therefore, the counts for mailing the advertising were not grounded on the now discarded principle that commercial speech does not enjoy constitutional protection but on the principle that government can prohibit the advertisement of an illegal product.

In broad terms, the *Ginzburg* Court described the case as follows:

> In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed

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[4] *Id.*

[5] 383 U.S. at 465.

that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York*, 383 U.S. 502, and as did the courts below...view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.[6]

The *Ginzburg* Court went on to say:

The decision in *United States v. Rebhuhn*, 109 F.2d 512 is persuasive authority for our conclusion...That was a prosecution under the predecessor to § 1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and 'could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written . . .' 109 F.2d. at 514 But the evidence, as here, was that the defendants had not disseminated them for their 'proper use, but . . . woefully misused

[6] 383 U.S. at 465-466.

> them, and it was that misuse which constituted the gravamen of the crime.'[7]
>
> We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.[8]

Read narrowly, *Ginzburg* stands for the principle that "in close cases evidence of pandering may be probative with respect to the nature of the material in question."[9] *Amicus* would contend that *Ginzburg* also stands for the common sense principle that explicit material that might otherwise enjoy First Amendment protection loses that protection if it is marketed for its obscene pornographic qualities. Or, as former Chief Justice Warren put it in *Jacobellis v. Ohio*:

> The use to which various materials are put – not just the words and pictures themselves – must be considered in determining whether or not the materials are obscene.[10]

As this Court also observed in *Miller v. California*, 413 U.S. 15, at 36 (1973), "civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine." *Amicus* would add that in the United

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[7] 383 U.S. at 472-473.

[8] 383 U.S. at 474. (It is noteworthy that neither the U.S. District Court, in determining that each publication was obscene, nor the U.S. Court of Appeals, in affirming the District Court judgments, appears to have based its decision in significant measure on evidence of pandering.)

[9] *Id.*

[10] 378 U.S. 184, 201 (1964) (Warren, E., dissenting).

States we do not allow unregulated access to morphine, period.

It doesn't take much imagination to think of situations where otherwise protected material would properly be prosecuted, depending on the "circumstances of presentation and dissemination."[11]

For example, exhibited in an art museum for their artistic value, some depictions of hardcore sexual conduct might be protected by the Constitution;[12] but marketed to the public for their prurient appeal, the same materials would properly be prosecuted. .

For example, distributed for their purported "sex-education" purpose, some self-described "highly explicit" and "highly arousing" videos might be protected by the Constitution, but marketed to the public for their prurient appeal, the same materials would properly be prosecuted.

Amicus notes that the reverse is also true, as illustrated by Section 235.15 of the New York Penal Law. Section 235.15 provides an "affirmative defense that the persons to whom allegedly obscene...material was disseminated... consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, distributing or viewing the same."

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[11] *Ginzburg*, 383 U.S. at 470.

[12] In one highly publicized criminal case in which the director of a Cincinnati art museum was acquitted, the material at issue included two photographs of the artist Robert Mapplethorpe that were alleged to be obscene. One photograph depicted a male urinating into the mouth of another. Another photograph depicted a male inserting a bullwhip into his own anus.

It doesn't take much imagination to think of situations where otherwise obscene material would presumably be protected, depending on the "circumstances of presentation and dissemination."[13]

For example, hardcore pornography that would properly be prosecuted if distributed in the marketplace might enjoy Constitutional protection if exhibited for its educational value in a college course on the subject of pornography's impact on women or if disseminated by a mental health professional to treat a sexual dysfunction.

Amicus further contends that in *Ginzburg* and its progeny, "pandering" is not being prohibited or regulated as "commercial speech." Rather, it is being considered as evidence of an underlying crime.

In *Splawn v. California*, 431 U.S. 595 (1977), the defendant was convicted of selling obscene material pursuant to jury instructions that incorporated California Penal Code Section 311(a), which now reads:

> In prosecutions under this chapter, if circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, this evidence is probative with respect to the nature of the matter and may justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value.

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[13] *Ginzburg*, 383 U.S. at 470. *See also, Stanley v. Georgia*, 394 U.S. 557 (1969) (mere possession of obscenity in the privacy of the home is protected by the Constitution).

Defendant argued, among other things, that his conviction violated the prohibition against *ex post facto* laws. In rejecting that argument, the *Splawn* Court said:

> California Penal Code, Section 311(a)...was enacted after part of the conduct for which he was convicted but prior to trial. That section, however, does not create any new substantive offense, but merely declares what type of evidence may be received and considered in deciding whether the matter in question was 'utterly without redeeming social importance.'[14]
>
> (Emphasis added)

Furthermore, the fact that pandering in the obscenity context typically involves matter that is commercially exploited[15] by the defendant – because that is the way most obscenity is distributed – does not mean pandering is or should always be limited to commercial exploitation.

The *Ginzburg* Court said this about the "commercial activity" in that case:

> No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the

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[14] 431 U.S. at 600. (Under the current test, to be obscene the "work," when taken as a whole, must lack serious artistic, literary, political or scientific value.)

[15] *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 57 (1973) ("we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity").

> frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.[16]

Subsequent to *Ginzburg*, this Court also held that the federal obscenity laws apply to the importation of obscenity for non-commercial use[17] and to interstate transportation of obscenity for non-commercial use.[18]

In particular, with respect to the Internet, sexual predators may pander sexually explicit "adult" material to entice, arouse, instruct and desensitize their child victims.

Further, *amicus* contends there are no constitutional concerns that would limit the pandering doctrine to obscenity cases. In "close cases" where there is a question as to whether a depiction of the child's genitals or pubic area is "lascivious"[19] or as to the age of the child, the defendant's own characterization of the material should be admissible in child pornography cases.

Amicus would add that while commercial traffic in child pornography is reportedly growing in leaps and bounds, it is still the case that many adults who are sexually interested in children trade child porn with other adults who are

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[16] 383 U.S. at 474.

[17] *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973).

[18] *United States v. Orito*, 413 U.S. 139 (1973).

[19] In the criminal cases involving the director of a Cincinnati art museum mentioned above in footnote 12, a third Robert Mapplethorpe photograph, alleged to be child porn, depicted a female child positioned in such a way that her pubic area was exposed, without underpants.

sexually interested in children, just as children once traded baseball cards

In closing, *Amicus* would point out that *Splawn* was decided in 1977, more than a decade after *Ginzburg* and one year after this Court determined in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), that commercial speech was entitled to First Amendment protection.

In *Splawn*, the Court stated:

> There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. *Hamling v. United States*, 418 U.S. 87, 130 (1974), *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). This is so partly because, as the Court has pointed out before, the fact that the accused made such an appeal has a bearing on the ultimate constitutional tests for obscenity:
>
> 'The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material

> in the courtroom was, in the circumstances, pretense or reality - whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes.'[20]

The Court also approved a jury instruction as to pandering in *Pinkus v. United States*.[21] And two years after Justice Stevens referred to *Ginzburg* as "anachronistic,"[22] the Court cited *Ginszburg* with approval in *Ashcroft v. Free Speech Coalition*:

> The Court has recognized that pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. *See Ginzburg v. United States*, 383 U.S. 463... ('In close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test'). Where a defendant engages in the 'commercial exploitation of erotica solely for the sake of their prurient appeal,' *Id.* at 466 the context he or she creates may itself be relevant to the evaluation of the materials.[23]

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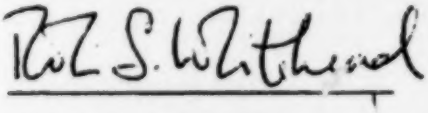
[20] 431 U.S. at 598-599.
[21] 463 U.S. 293, 303-304 (1978).
[22] 529 U.S. 803, 829.
[23] 535 U.S. 234, 258-259 (2002).

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare the pandering provisions of The PROTECT Act constitutional.

Respectfully submitted,



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